IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.11.2006

Coram :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.667 of 2004

The Commissioner of Income Tax,
Tamil Nadu-IV, Chennai. ..Appellant

Vs

M/s.A.V.M.Production,
38, Arcot Road, Chennai. ..Respondent

Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'A' Bench, Chennai, dated 27.3.2003 passed in I.T.A.No.908/Mds/1999 for the assessment year 1993-94 against the Commissioner of Income Tax (Appeals) X, Chennai- 34 in I.T/WT/GT/Appela No.ITA 54/96-97 date of order 22.3.1999 for the Assessment year 1993-94 and against the Deputy Commissioner of Income Tax, Film Circle, Chennai 600 006. PAN.GIR No.47-066/FX-3608 date of order 30.1.1996 Assessment year 1993-1994.

For Appellant : Mr.N.Muralikumar
Sr.Standing Counsel

For Respondent : Mr.T.R.Senthilkumar

J U D G M E N T

(Delivered by P.D.DINAKARAN, J.)

The above tax case appeal is directed against the order of the Income-tax Appellate Tribunal in I.T.A. No.908/Mds/1999 dated 27.3.2003.

2. The Revenue is the appellant. During the relevant assessment year, viz., 1993-94, the assessee's claim for deduction under Section 80HHC in respect of transfer of exhibition of rights in regard to one print of a film outside India, was disallowed by the assessing officer holding that it would not amount to export of any goods or merchandise. Against the said order of the assessing officer, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals), who allowed the appeal, against which, the

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Revenue went on appeal before the Income-tax Appellate Tribunal and the Tribunal also held the issue in favour of the assessee. Hence, the present tax case appeal by the Revenue raising the following substantial question of law:

> " Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that, granting of deduction under section 80HHC of the Income-tax Act, 1961, in regard to export of one print of a film for exhibition out of India is valid in law ?"

3. Mr.N.Muralikumaran, learned senior standing counsel appearing for the Revenue, fairly submits that the issue raised in the above question of law is squarely covered against the Revenue by the decision of the Bombay High Court in Abdulgafar A.Nadiadwala Vs. Dy.CIT [(2004)267 I.T.R. 488], which was followed by this Court in Commissioner of Income-tax v. V.C.KUGANATHAN (unreported decision in T.C.(A) Nos.224 of 2003, etc. Batch, by judgment dated 31.10.2006).

4. The Bombay High Court, in the case of Abdulgafar A.Nadiawala, referred supra, while considering the scope of Section 80HHC in regard to the transfer of telecasting of films to a foreign enterprise, held as follows:

> "Points for determination:
>
> The substantial points for determination, in a narrow compass, on rival contentions as between the parties canvassing rival views, on the facts and circumstances of the case, are as under:
>
> 1. Whether the product involved can be said to be "goods" and/or "merchandise"?
>
> 2. If yes, can it be said that it was exported out of India by way of sale or otherwise involving clearance at the customs station?
>
> 3. If yes,whether the consideration received can be described as sale proceeds constituting part of export turnover?"

In respect of first point, the Bombay High Court held as follows:

> "Having given our anxious consideration to all the factors referred to hereinabove, the transaction in question, whereby the assessee had purchased the rights of various decoders and had recorded on beta-cam tape and entered into an agreement with the Star TV for transfer of telecasting rights for Asian region for a period of five years, can conveniently be described as article or thing falling within the sweep of the word "goods" or "merchandise". We, therefore, hold that the beta-cam tape, which has incorporeal rights, is a "goods" or

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"merchandise" for the purposes of section 80HHC of the Act."

In respect of second point, the Bombay High Court held as follows:

"Having taken the survey of various provisions, one fails to understand as to why the word "otherwise" should not cover within its sweep such types of transactions and, if such types of transactions are taken into account, then they would be nothing but sale for the purposes of section 80HHC. We, thus, hold that the transaction in question involved export of goods out of India falling within the sweep of the concept of "sale" involving clearance at the customs station as contemplated under section 80HHC of the Act."

In respect of third point, the Bombay High Court held as follows:

"Reading of the above illustrations in general and clauses (v) and (vi) thereof in particular make it clear that while describing the deduction under section 80HHC the words used are 50 per cent of the "export proceeds" brought into India. It is, therefore, clear that even the Central Board of Direct Taxes has understood the words "export proceeds" to be synonymous to "sale proceeds". If that be so, the amount received by way of consideration in the transaction in question can conveniently be termed as "export proceeds" equal to that of "sale proceeds". Once we hold that the transaction involved in this case is akin to "sale" falling within the sweep of the words "sale or otherwise" then the consideration i.e., export proceeds received can be termed as "sale proceeds".

Finally, the Bombay High Court considered the above contentions in detail and held as follows:

"In the above view of the matter and following the well recognised principles of interpretation reiterated from time to time and adopting purposive interpretation keeping in mind the practical common sense approach and commercial expediency we have reached the conclusion that the transaction involved in this appeal, on the facts and circumstances of the case, is well within the sweep of section 80HHC of the Act and all the authorities below were not justified in denying the deduction to the claim of the assessee under section 80HHC in the sum of Rs.84,23,746 in respect of export of beta-cam tapes as per agreement dated March 29, 1995.

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> We, thus, hold that the assessee is entitled to such deduction under section 80HHC of the Act and allow the appeal on this count. Accordingly, we answer the question in favour of the assessee and against the Revenue on this count."

5. That apart, the Apex Court, while considering the scope of the word "goods" in Tata Consultancy Services Vs. State of Andhra Pradesh (271 ITR 401), held as follows:-

> "It is not in dispute that when a programme is created it is necessary to encode it, upload the same and thereafter unloaded. Indian law, as noticed by my learned Brother, Variava J., does not make any distinction between tangible property and intangible property. A "goods" may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods. Unlike the American courts, Supreme Court of India have also not gone into the question of severability."

6. Applying the above said principles, this Court, by judgment dated 31.10.2006, in Commissioner of Income-tax v. V.C.KUGANATHAN (unreported decision in T.C.Nos.224 of 2003, etc., batch), referred supra, observing that exporting the right for exhibition of positive print is nothing but sale of goods or merchandise, held that the assessee had satisfied the conditions contemplated under Section 80HHC of the Act and hence the assessee is entitled for the deduction under Section 80HHC of the Act.

In view of the above settled proposition of law, we answer the questions of law in favour the assessee and against the Revenue. Accordingly, the tax case is dismissed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

sra

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To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
III Floor, Rajaji Bhavan, Besant Nagar,
Chennai-600 090.

2.The Commissioner of Income Tax,
Tamilnadu IV, Chennai.

3.The Commissioner of Income Tax
(Appeals)X, Chennai-34.

4. The Deputy Commissioner of Income Tax,
Film Circle, Chennai-6.

1 cc to Mr.T.R.Senthilkumar, Advocate, Sr. 58654
1 cc to M/s. Pushya Sitaraman, Advocate, Sr. 59143

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